No. 266.

Brf. of Williams for Def.

Supreme Court U.S.
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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 266.

WILBERFORCE SULLY, Trustee, et als.

vs.

AMERICAN NATIONAL BANK, et. als.

IN ERROR TO SUPREME COURT OF TENNESSEE.

BRIEF AND ARGUMENT IN BEHALF OF CERTAIN DEFENDANTS IN ERROR, BY

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BRANDON, GADSDEN & CLEVE, PRINTERS

Supreme Court of the United States.

OCTOBER TERM, 1899.

WILBERFORCE SULLY, TRUSTEE, ET ALS.,
v.
AMERICAN NATIONAL BANK, ET ALS.

No. 266.

BRIEF IN BEHALF OF CERTAIN OF THE DEFENDANTS IN ERROR, WHO ARE CREDITORS RESIDING IN THE STATE OF TENNESSEE.

STATEMENT OF CASE.

The writ of error in this cause is sued out to attack Tenn. Act 1877, Ch. 31, Sec. 5, as unconstitutional, in behalf of two distinct classes of creditors of the Carnegie Land Company; to-wit: (A) Creditors who are general unsecured claimants, asserting rights in conflict with those asserted by the other class; to-wit: (B) Creditors who claim under two separate mortgages, the Travelers' Insurance Company, a body corporate with *situs* in the State of Connecticut, and A. B. Carhart, a resident of the State of New York.

The Travelers' Insurance Company is the adjudged owner of the indebtedness of $35,406.10 secured by its debtor, the Carnegie Land Company, by a deed of trust to the Connecticut Trust and Safety Deposit Company, of Hartford, Connecticut, as Trustee, upon the property (real and personal) known as the Hotel Carnegie property, in Johnson City, Tennessee. Said trust conveyance was registered Nov. 23, 1891: Petition, Rec. 34: Stipulation, Rec. 144.

It will be noted that, while the said Trustee is made a party to the record below, it is not made a party *in anywise* to this writ of error.

The said A. B. Carhart is the adjudged owner of $85,000.-00 of bonds, (aggregating, with accruals of interest, $105,-124.99) secured by a mortgage or trust deed, to Wilberforce Sully, as Trustee, upon the above mentioned Hotel Carnegie property, subject to the above recited mortgage securing Travelers' Insurance Company, and also upon certain other realty of Carnegie Land Company not covered by the mortgage securing that Insurance Company.

The mortgage to Wilberforce Sully, Trusustee, was registered February 10, 1893: Stipulation, Rec. 145.

An error in the statement by plaintiffs in error is: That A. B. Carhart raised the constitutional "questions now involved in the *lower courts* and in the Supreme Court of Tennessee." The facts are that these questions were raised for the first time in an appellate court—the Court of Chancery Appeals, *after a limited appeal* from the lower court, upon writ of error by said Carhart, directed by the appellate court to Chancery Court at Johnson City: Bill of Carhart, Rec. 14; Petition, Rec. 36; Opinion, Rec. 69.

It is admitted that A. B. Carhart, in his capacity of complainant-mortgagee only, raised the constitutional questions before disposition of the cause on appeal, but it is denied that he raised the questions otherwise, or prior to appeal. The immunity was not set up in the trial court: May, Supreme Court Practice, 92; 123 U. S., 181; 153 U. S., 538; 160 U. S., 646.

There being two distinct classes among the plaintiffs in error—general unsecured creditors and mortgagees—these defendants in error will first reply to the errors assigned in behalf of the general unsecured creditors.

BRIEF AND ARGUMENT.

A.—RIGHTS OF GENERAL CREDITORS.

The plaintiffs in error, A. B. Carhart, Mrs. Mary P. Myton, and Wilberforce Sully, as assignee of the claim of E. C.

Manning against the Carnegie Land Company, it is apparent, can only hope to recover out of the assets in event the mortgages aforesaid fail in the maintenance of the liens of their respective mortgages. The mortgage debts aggregate, as has been seen, above $140,000.00, while the entire assets produced a fund of only $66,123.31 : Stipulation, Rec. 145.

I. PRIVILEGES OF STATE CITIZENSHIP.—These particular plaintiffs in error assign as error that Act 1877, Ch. 31, Sec. 5, is unconstitutional under U. S. Constitution, Art. IV, Sec. 2, because said Act, while giving the privilege as to priority of satisfaction out of the Carnegie Land Company's assets to residents of Tennessee, denies a like privilege to them as citizens and residents of the State of New York.

Said Section 5, is as follows : "The (foreign) corporations and the property of all corporations coming under the provisions of this Act, shall be liable for all debts, liabilities, and engagements of said corporation, to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements and contracts. Nevertheless, creditors who may be residents of this State shall have a priority in the distribution of assets, or subjection of the same or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by the said corporation previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequent to the date of their registration or rendition."

(a) *Are these plaintiffs in error "citizens ?"*— It is agreed that none of these persons attempted to prove in what jurisdictions they were *citizens*,, respectively : Rec. 147. It further appears that none of them *in pleading*

averred *citizenship* in any State of the Union: Rec. 14, 36. It does appear that A. B. Carhart and Mrs. Myton, (not E. C. Manning) in pleading averred, and in proof showed, their place of *residence* to have been the State of New York.

The adjudication made in the case of *Blake v. McClung*, 172 U. S. 239, is referred to as conclusive of the status of plaintiffs in error as to citizenship. The records in that case and in the one at bar are by no means identical, in respect to this matter. In the case of *Blake v. McClung*, the *pleadings* of the prevailing plaintiffs in error, filed in the Chancery Court, stated "that they were residents of Ohio, engaged in business in that State, their residence, offices and places of business being at the city of Cincinnati, *and they were citizens of the United States and not citizens of Tennessee.*" It further appeared to this Court that "*no question has been made* in the State Court that the individual plaintiffs in error were not citizens." 172 U. S. 246.

In the case at bar it appears from the record that these plaintiffs in error in pleading did not aver citizenship in New York, citizenship of the United States, or non-citizenship in Tennessee. Further and especially, these plaintiffs in error did not, in the Chancery Court at Johnson City, make any averment or raise any question *as to citizenship or constitutional right depending thereon, respecting which any proof would have been applicable.* To put it otherwise: there was no issue that would have made proof of the citizenship, as contradistinguished from the residence, of plaintiffs in error, relevant. If, *during the entire proof-taking time*, no such question was made, can it in fairness be said that the parties treated proof of residence equivalent to proof of citizenship? If an inference is to be drawn it will be one of fact, one of a probative fact, and such proof or inferences of probative facts can only arise under an issue to which they can be referable. Will this Court go further than it did in *Blake v. McClung* and rule that without any sort of question, depending for solution upon proof of citizenship, being raised or pleading otherwise, in the only court of proof,

and without proof of citizenship, the presumption will be indulged in this Court that a resident of New York was a citizen of that State, touching a right that inheres in citizenship?

The question has been answered by this Court: "The averment that a party resides in a particular State does not import that he is a citizen of that State (cases cited). *Upon like grounds* the jurisdiction of this Court to re-examine the final judgment of a State Court cannot arise from mere inference, but only from *averments so distinct and positive* as to place it beyond question that the party bringing a case here from such court *intends to assert a Federal right:*" Stave Company v. Butler County, 166 U. S. 655.

The record clearly distinguishes this case from *Blake v. McClung* in this respect. If proof without proper pleading will not support a decree in equity, it would seem that lack of both pleading and proof as to this point will not support a jurisdiction thus distinctly restricted by this Court.

That this constitutional question was raised by Carhart in the Court of Chancery Appeals, under a writ of error specially *sued out for that sole purpose*, is clearly shown by the opinion of that Court: Rec. 69.

There should be no inference of fact indulged against defendants in error on a question that was raised after the time for taking proof was past: May, Sup. Ct. Prac., 92.

But it is argued that the stipulation of counsel states that plaintiffs in error were "non-residents of Tennessee *within the meaning* of Act 1877, Ch. 31;" and that, as this Court in another case (*Blake v. McClung*) construed the word "resident" to be the equivalent of "citizen," this stipulation amounts to an agreement that certain of plaintiffs in error are citizens of New York.

There are three answers to this unique contention: (a) An agreement that a person is *not a citizen* of Tennessee, *but is a resident* of New York (Rec. 147) is by no means an admission that he has a constitutional status of a *citizen of New York*. (b) It will not be inferred that a decision in

Blake v. McClung (December, 1898,) sheds light upon the record in this cause, the final decree in which was passed by the Supreme Court of Tennessee in November, 1898, or upon an undated stipulation respecting said final decree. (c) It plainly appears that the counsel of defendant in error did not mean to admit that the citizenship of plaintiffs in error was proven. They caused the insertion of a later clause which set forth that no attempt was made to establish the *citizenship* of said persons: Rec. 147.

If the construction is placed upon the stipulation contended for by plaintiffs in error, it will be against the real intent of the defendants in error; by a play on words taken from an opinion in a cause to which they were not parties, as to which some of them and their counsel, at least, were in ignorance. The stipulators were ten in number: Rec. 147.

(b) *As respects E. C. Manning (and his claim), there is failure to show even residence.*—The claim of E. C. Manning amounts to about $46,000.00, and its *status* is a matter of no inconsiderable moment. This claim was transferred to Wilberforce Sully, pending the litigation in Chancery Court at Johnson City.

(1.) There appears in the record no *averment by pleading* that E. C. Manning is either a resident or citizen of any particular jurisdiction.

(2.) There is no proof or admission respecting the residence or citizenship of said Manning. It is admitted in the stipulation that the residences of the parties in interest are as therein indicated. It is indicated that Wilberforce Sully, *assignee* of said Manning, is a resident of the State of New York, but nowhere is the residence of the *assignor* indicated. This failure to show in the Agreed Record the residence of Manning was not accidental. If permissible, under the rules of this Court, to look to the full transcript of the record in this Court, and beyond the printed record, it will be found that the report of the master in equity, confirmed by the chancellor, contained this find-

ing in reference to said E. C. Manning claim: "XI 5. Wilberforce Sully, a resident of New York, debt by judgment in favor of E. C. Manning, of Washington, D. C., assigned by said Manning to said Sully, $46,577.15."

Thus, if we look only to the printed record, it contains neither averment nor proof of the residence, (not to mention citizenship,) of Manning. If we look beyond to the transcript, it is found that Manning was a resident of the District of Columbia, which is not a State within the meaning of the Federal Constitution. If Art. IV, Sec. 2, is invoked, it must be because of a right inhering in one by reason of his *State* citizenship, and Manning not being a resident of a State of the Union has no status thereunder.

A State, in the meaning of the Constitution, does not include that District: Hepburn v. Ellzey, 2 Cranch, 455; and the *status* of only a State citizen may be reviewed in this Court as to infringement of the Constitution: Miners' Bank v. Iowa, 12 Howard, 1, cited in Lyon v. Woods, 153 U. S., 661; Scott v. Jones, 5 How., 343.

A citizen of the District of Columbia is not a citizen of a State, within the sense of the Judiciary Act, as to removal of causes: Cameron v. Hodges, 127 U. S., 325; Hooe v. Jamieson, 166 U. S., 395. Or within the meaning of the same Act, Section 25, in respect of the jurisdiction of this Court to review judgments of State Courts: Miners' Bank v. Iowa, *supra.*

The distinction between States and Territories is drawn in this *same article* (Art. IV, U. S. Constitution, Secs. 2 and 3), and privileges and immunities guaranteed only to citizens of States.

(c) *Residence and citizenship that of original contractor.*—If Manning's residence is not shown, then the demand that he transferred to plaintiff in error, Sully, can not have the status of a preferred claim—equality with residents of Tennessee, even though Sully be treated as a *citizen* of the State of New York. It clearly appears from the opinion and decrees of the Tennessee Appellate Courts, that

they construed Act 1877, Ch. 31, Sec. 5, to give priority to the claim of a resident creditor only in event he *affirmatively* showed that the particular claim was created or incurred to or with him, originally; that if a note were executed by the Carnegie Land Company to a resident of Kentucky, and the same were by him endorsed to a resident of Tennessee, the latter would not have priority; conversely, that if the note were executed to a resident of Tennessee and endorsed by him to a resident of Kentucky, the latter would have the *status* of a Tennessee resident-claimant.

This was the contention made by the counsel of Sully in respect of another claimant in the State Courts: Rec. 121, 122.

And the Courts responded, sustaining his contention: "Is the American National Bank, confessedly a resident creditor, entitled to the preference given by the statute with respect to its debts assigned to it by a party *whose residence is not disclosed in the record?* The majority of the Court hold that before this bank is entitled to put this debt on the preferential footing given by the statute, it was its duty to make it *affirmatively appear* that it had not been assigned to it by a non-resident of the State."

So that it matters nothing what was the residence or citizenship of the assignee, Sully. Before he is entitled, under this construction of the statute by the State Courts, to the priority of a resident of Tennessee, or (since *Blake v. McClung*) to the priority of an individual citizen of another State, he must affirmatively show that his assignor had the *status* of a resident of Tennessee, or of a citizen of some State of the Union. This he has failed to do. *Non constat*, the debt on which Manning himself recovered was originally contracted to a non-resident corporation, and transferred to him. The burden was upon this claimant to show the status of the original creditor holding the claim.

A. B. Carhart and Mrs. Mary P. Myton, as general unsecured creditors on certain notes, also failed to comply with the requirement as to the burden of proof.

Wilberforce Sully, it will be noticed, purchased another claim and had it assigned to him—that of W. E. Maiden; and, finding that he could carry the burden of showing a constitutional *status* for his said assignor, did so: Rec. 60, 69.

(d) *Priority to those only whose claims antedate mortgages.*—There was a requirement imposed by the Tennessee Courts, in order to the *status* of a creditor entitled to priority of satisfaction over the mortgages. All creditors alike (residents and non-residents) were postponed who failed to show that their claims were not incurred subsequent to the date of the registration of the mortgages respectively—subsequent to the attaching of the lien of the mortgages.

This rule was likewise contended for in the Courts below by the counsel of the plaintiffs in error: "We take it that it will not be disputed that before a claim can have the *status* of a Tennessee creditor, whose debt was *contracted before the registration of the mortgage*, it must show itself entitled to that *status*—must show its priority": Rec. 122.

The Court responded by a favorable ruling, and even went to the point of disallowing attorneys' fees, validly contracted for, in notes given to creditors prior to mortgage-registration, unless it were shown that the fees were earned prior to the lien of the mortgage: Rec. 72.

None of the plaintiffs in error show either by their pleadings or in proof, that their claims arose prior to the liens of the mortgages or either of them. The last mortgage was registered February 10, 1893. A. B. Carhart avers that as to the note and mortgage bonds pledged as collateral thereto, his claims arose March 1, 1893; Mrs. Myton that her claim arose May 25, 1893; as to the Manning claim, there is no averment or proof to show when it arose.

If these plaintiffs be entitled constitutionally to the *status* of residents of Tennessee under *Blake v. McClung*, then they have failed to show themselves prior in right to the mortgage claimants, or to share defendants' priority, in that they fail

to prove creation of their claims before the registration of the mortgages.

The requirement of the statute and the State Court that claimants should so show the date of creation of their claims, as a condition to their sharing in the assets preferentially, will not be interfered with by this Court: Castillo v. McConnico, 168 U. S., 680, and cases cited.

As we have seen, if plaintiffs in error have not priority over the mortgages, these mortgages, or even the second one, will more than consume the assets before their claims are reached, and the debate becomes a moot one.

Thus, failing to show themselves entitled to share with defendants in error, in that they failed to show that their demands antedated the mortgage lien, every one of these plaintiffs in error must fail of relief. They fail on a question other than a Federal one: Castillo v. McConnico, *supra;* Gillis v. Stinchfield, 159 U. S., 600; Harrison v. Morton, 171 U. S., 47.

The purpose of Art. IV., Sec. 2, "was to declare to the several States that whatever those rights, as you grant or establish them to your citizens, *as you limit or qualify or impose restrictions* on their exercise, the same *neither more nor less*, shall be the measure of the rights of citizens of other States": Slaughterhouse Cases, 16 Wall., 36; Blake v. McClung, 172 U. S., 257.

(e) *Failure to except, appeal and assign errors below.*—All of the plaintiffs in error standing in the right of general unsecured creditors, saving only A. B. Carhart, must also fail on these grounds: (1) They did not except to the master's report postponing their demands to the satisfaction of the mortgages; (2) they did not appeal from the decrees of the Chancery Court at Johnson City, thus postponing them and denying them the status of residents of Tennessee; (3) they did not, in the Appellate Courts of Tennessee, assign errors or cross-errors, challenging the attention of the Courts to their rights, statutory or constitutional—particularly, they failed to raise, in any of

the courts of Tennessee, a Federal question to support their present writ of error. And herein:

(1) In Tennessee the rule of law is that a party who fails to except to a report of the master under a reference, will not after confirmation be heard to complain. The report is conclusive on appeal. Even a minor appellant thus failing will be barred of relief: Grinstead v. Huggins, 13 Lea, 731; Gibson's Tenn. Ch. Prac., Sec. 598. Even though the appeal be a broad one: Owens v. Pearce, 5 Lea, 466.

The Court of Chancery Appeals recites the names of the various exceptants (those appealing and those not appealing) and the names of Mrs. Myton, E. C. Manning or Wilberforce Sully, as his assignee, do not appear: Opinion, Rec. 60.

Had these persons appealed, their appeals would have been ineffectual and dismissed for this reason, and a Federal question would not have availed them.

(2) These two claimants did not except to or appeal from the decrees of the Chancery Court at Johnson City: Rec. 51, 52.

It is contended, however, that inasmuch as A. B. Carhart and others appealed, and, as is further contended, relief ought to have been granted said Carhart where it was denied, this Court will, if it grants Carhart relief, at the same time open the decree of the several Courts of Tennessee so as to grant like relief to Mrs. Myton and Wilberforce Sully as Assignee of E. C. Manning.

(aa) There was no broad appeal except by one party—Travelers' Insurance Company. The appeals of all others were special. The rule in Tennessee is that an appeal by an *antagonistic party*, even though a broad one, will not avail his opponent. Thus, where an appeal is broadly taken by a complainant, and the respondent attempts to have the Supreme Court adjudge in his favor a question that has been decided in the lower court against him, but to correct which adverse adjudication he

did not appeal, it will stand and the Supreme Court will refuse to review it: Shields v. Alsup, 5 Lea, 524; Smith v. Gooch, 9 Lea, 536. Here the plaintiffs in error, who are general creditors, were in direct antagonism to Travelers' Insurance Company. Their claim is that they should have priority over that Company's mortgage along with others.

If it be contended that Mrs. Myton and Sully, assignee of Manning, stand with Travelers' Insurance Company in such a sense as to put them in a class with it, entitled to the relief awarded to it, then Travelers' Insurance Company, being a foreign corporation and not entitled to the protection of Art. IV., Sec. 2, properly failed in reversing the lower court in the Tennessee Appellate Courts, and this non-success would have likewise affected those seeking the benefit of the Company's broad appeal.

The broad appeal of Travelers' Insurance Company would not cure the failure of these persons to except to a report under reference: Long v. Read, 9 Lea, 544; Henderson v. Donovan, 13 Lea, 293.

(bb) But it is argued that Mrs. Myton and Sully, assignee of Manning, stand in the same right with A. B. Carhart, who did appeal to the Tennessee Appellate Courts, and that since Carhart is a non-resident individual, entitled, the argument proceeds, to the protection of Art. IV., Sec. 2, this Court will grant them a like measure of relief, notwithstanding their own failure to except or appeal from the decrees of the Chancery Court. It will be noted that *Carhart's appeal was special*, and in Tennessee a special appeal brings into review only the particular matters specified: Wharton v. Lavender, 12 Lea, 179; Wood v. Cooper, 2 Heisk., 441; Bell v. Horn, 1 Shannon Tenn. Cas., 589; Loftis v. Loftis, 94 Tenn., 237.

It will be further noted that even Carhart so restricted his *appeal* as to carve out any chance to complain that constitutional privileges and immunities had been denied him by the Chancellor: Rec. 50, 51. And in order to make this question, which was an after-thought purely, Carhart prose-

cuted a special writ of error, supplementing his special appeal: Rec. 69. Of course, on writ of error, only the rights of the *plaintiff in error*, particularly referred to in the petition for the writ, are brought into review. Had the Supreme Court of Tennessee granted Carhart his claim to the protection of Art. IV., Sec. 5, it could not under its procedure have granted like relief to one who did not join him in the writ of error, but who acquiesced in the decree rendered below.

(cc) It is not the law in Tennessee that, in event of a broad appeal and grant of relief to the one creditor who appeals, a like measure of relief will inure to a non-appealing creditor against the same estate.

There is a rule in that State that in event there is a broad appeal by one person standing *in the unity of right* as another non-appealing party, the decree will be molded to meet the rights of both as there determined. Thus, a successful broad appeal by one heir will avail a non-appealing heir, *when their common estate is affected:* Allen v. Shanks, 90 Tenn. (6 Pickle), 382. A broad appeal by a dowress will affect and avail her own children, heirs, in respect of a *common estate:* Parsons v. Kinzer, 3 Lea, 352. A broad appeal by one partner will avail a non-appealing partner: Butler v. Kinzie, 90 Tenn. (6 Pickle), 32.

But it will be noted that in all of these cases there appeared a unity or quasi-unity of interests. In the last named case, the Court calls attention to the difference between such joint or mutual interest, and distinct rights: Butler v. Kinzie, *supra*, citing 2 Coldwell, 271.

"The doctrine has never been applied where there are no joint or common interests": Jardon v. Hollister, 2 Coldwell, 271. Thus, in equity causes, where there is a decree against a principal and his surety, and the principal alone appeals, no relief is grantable to the surety: "If the surety wishes the decree reviewed as to himself, he must do so on the same terms as other defendants, by giving bond as required by law": Bottoms v. Leatherman, 3 Legal Rep. (Tenn.), 135;

S. C., 3 Shannon Cas., 269; Briggs v. Hinton, 14 Lea, 236; 4 Baxter, 217; 8 Humph., 489. An appeal by one of two tenants in common and modification in his behalf, does not avail the non-appealing tenant: Morgan v. Hannah, 1 Shannon Cas., 28; S. C., Thomp. Tenn. Cas., 44; Reeves v. Murphy, 1 Shannon Cas., 424.

And the Tennessee Court has decided the exact point here made by said plaintiffs in error against them: Where two distinct creditors file a bill in equity against the administrator of a decedent for recoveries and an accounting as to decedent's personal estate, which bill is dismissed as to one of said complainant creditors, but sustained as to the other; and where the latter, unsuccessful, creditor alone appeals, it was held that "the demands of complainants were unconnected with each other, upon which separate suits might have been brought; each complainant stands on his own right of action. And this is so even in the incidental *matter of account*, as much so as if the bill had been filed by one of them *for himself and other creditors*, and the other had *come in by petition*, and had himself made a party": Cooper v. Lyon, 9 Lea, 600.

Therefore, the appeal of Carhart, had it been a broad one, would not have availed the other plaintiffs in error, who intervened by petition on distinct causes of action.

Where the parties interested in the allowance of an amount made by the master have not appealed from the decree of confirmation, the allowance must stand. The rule is common to this Court and the Courts of Tennessee: Goodwin v. Fox, 129 U. S., 601; Cleary v. Foundry Co., 132 U. S., 612; U. S. v. Blackfeather, 155 U. S, 311.

In the Appellate Court a party not appealing cannot take advantage of an error in the decree committed against himself; if he desires to avail himself of such error, he should take a cross-appeal, failing in which he admits the correctness of the decree as to him: Chittenden v. Brewster, 2 Wallace, 199; Loudon v. Shelby Co., 104 U. S., 778.

Had these rights been reviewable in the Supreme Court, that court demands specific assignments of error by any person asking relief, and the record shows that neither of these plaintiffs assigned errors there: 86 Tenn., 37, 500; 89 Tenn., 775 (rules same as this Court's).

Had they assigned errors, the rule of that Court is that they would not be considered where a question is thereby raised that was not made in the pleadings or noticed in proof, in the court below: Stainback v. Junk, 98 Tenn., 306.

Furthermore, the effect of the existence of an intermediate Appellate Court in Tennessee must be considered. Where no appeal is prayed by a defendant from an appeal of the Chancellor, and no point is made in the Court of Chancery Appeals upon the rights of such defendant, the Supreme Court of Tennessee will decline to review his rights, even though he appeals from the decree of the Court of Chancery Appeals. In the case at bar, Mrs. Myton and Manning's assignee failed to appeal from the decree of the Court of Chancery Appeals as well as from that of the Chancellor: Pile v. McCoy, 99 Tenn. (15 Pickle), 367.

(3) The said two plaintiffs did not at any time in the Courts of Tennessee, raise the Federal question (violation of Art. IV., Sec. 2, of the Constitution,) relied upon here to reverse their decrees.

This is conceded by counsel for said plaintiffs in error, who claim, however, that the raising of that Federal question by their co-plaintiff in error will inure to their benefit.

No intendments are indulged respecting the raising of a Federal question below. It should *unmistakably* appear that the question was *properly* raised in the State Court: Brown v. Colorado, 106 U. S., 97.

The attention of the court below must not only be called to the particular clause of the Constitution, but also to the *right plaintiff in error* claims under it: Forney v. Towle, 1 Black, 350. The Federal right must be *personal* to the plaintiff in error: Missouri v. Andrews, 138 U. S. 497. The

right must be claimed by each person for *himself*, not for another: Hale v. Gaines, 22 Wall, 161; Miller v. Bank, 106 U. S. 542, and cases cited; Long v. Converse, 91 U. S. 105. When raised by a defendant in error, it cannot avail a plaintiff in error: Manning v. French, 133 U. S. 190. What if the question raised by Carhart had been decided by the State Court in his favor, would Mrs. Myton have *status* here, and the Court jurisdiction? Manning v. French, *supra*. It appears that Travelers' Insurance Company undertook for itself to raise the Federal right under Art. IV, Sec. 2. It is clear that it has no *status* under that clause of the Constitution; (Blake v. McClung, 172 U. S. 250). Had Travelers' Insurance Company and Mrs. Myton been the only plaintiffs in error, and had the Insurance Company thus failed, would Mrs. Myton have *status*, and the Court jurisdiction?

The Insurance Company raised its own Federal question, that of privileges and immunities of State citizenship; whereas, its only *argument in this Court* is directed to rights under the Fourteenth Amendment. *Non constat*, had Mrs. Myton raised a Federal question, it would have been denial of process of law under Fourteenth Amendment. Will the Court impute to Mrs. Myton a better record as to the raising of a Federal question, than has been made by diligent and able counsel for the Insurance Company for it?

This Court has put the point thus: "Under what clause of the Constitution did plaintiff in error make his claim? The record does not show. For aught that appears in the record, some other clause in the Constitution may have been relied upon, etc. The clause should have been specified by plaintiff in error in the State Court, in order that this Court might see what was the right denied them:" Maxwell v. Newbold, 18 How. 516.

If these two plaintiffs in error are assumed to have raised the Federal question, will this Court also assume that the Supreme Court of Tennessee would not have precluded them on other valid grounds? Their demands were not fought in that Court since it was immaterial, in the then

condition of the record, whether Manning's claim was $46.00 or $46,000.00—it did not reach to actual recovery. There were, in fact, valid defenses to said claim, that would have been urged had it claimed any *status* other than the one given it.

It thus appears that these two appellants, without excepting to a report of the master, without excepting to the decree of confirmation, without praying an appeal therefrom, without assigning errors to call attention to their supposed rights, without excepting to the decree of the Court of Chancery Appeals, without appealing therefrom, without assigning errors in the Supreme Court, and without so much as saving exception to the decree of that Court, ask this Court to decree them rights they never thought of asserting, until *after* the ruling of this Court in *Blake v. McClung*, 172 U. S. 250.

If any of these questions of State procedure or law are determinable against these plaintiffs, this Court will not assume jurisdiction: Klinger v. Missouri, 13 Wall. 257.

II. FOREIGN CORPORATION NOT ENTITLED TO PRIVILEGES AND IMMUNITIES IN QUESTION —The Travelers' Insurance Company, it is clear, has not a *status* as a general creditor to share with Tennessee residents on terms of equality: Blake v. McClung, 172 U. S. 251.

B.---RIGHTS OF MORTGAGEES.

I. UNDER ART. 4, SEC. 2, U. S. CONSTITUTION. —It appears that one of the mortgagees, A. B. Carhart, is a non-resident individual. If it should be held against our contention—*ante* A.—I (a)—that he is, upon this record, also a *citizen of New York*, we shall have next to consider whether said Carhart has been denied a privilege or immunity, inhering in such citizenship, by that portion of Tenn. Act 1877, Ch. 31, Sec. 5, which provides that the lien of mortgages shall be subject to certain debts against the mortgagor.

The argument is that the lien of a mortgage if taken by a resident of Tennessee is not subjected to such priorities, and that the mortgage if taken by a citizen of another State is made so subject; that, therefore, the resident citizen of Tennessee is granted an immunity which must likewise be granted to a citizen of the State of New York.

(a) The fallacy affecting this argument is in the assumption that there is any discrimination as to rights claimed under mortgages held by citizens and non-citizens of Tennessee. The language of the statute is: "Nevertheless, creditors who may be residents of this State shall have priority in the distribution of assets, or subjection of same or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors," for all debts made or owing by the corporation previous to the registration of such mortgage or rendition of such judgment.

This language shows that the lien of a mortgage, whether executed to secure a Tennessee or a New York creditor, shall be subject to certain previously contracted debts. It will be noticed that the clause, "being residents of any other country or countries," succeeds and qualifies "simple contract creditors," and not "mortgage or judgment creditors;" that the Act does not read "*such* mortgage or judgment creditors," or "mortgage or judgment creditors so residing." The statute as written gives to residents of Tennessee priority over *all* mortgages the liens of which after-attach.

Every rule of statutory construction will compel that holding, it would seem. And herein—

(1) "Primarily, a statute is to be interpreted according to the proper grammatical effect of the arrangement of the words in the act. Qualifying phrases should be confined to their next antecedent, in the absence of punctuation showing a different intent." By this test all mortgages are subjected.

(2) There are presumptions, in the construction of statutes, against their being instruments of injustice, against a construction that would work inconvenience or absurdity in its practical operation. These presumptions are common to the Tennessee Courts and this Court: U. S. v. Kirby, 7 Wallace, 482; Oates v. Bank, 100 U. S., 239; Washington, etc., Co. v. Company, 160 U. S. 354; Railroad v. Horne, 1 Coldwell (Tenn.) 77.

(a) It needs no argument to show that a construction that would subject the lien of all mortgages alike, would be more consonant with justice.

(b) The construction contended for by these defendants in error is the only one that would not make the statute work absurd results and great inconvenience in enforcement. Let us assume that the $300,000.00 of bonds secured by the blanket mortgage to Wilberforce Sully, Trustee, registered Feb. 10, 1893, had been placed in the hands of financial agents in New York for sale by subscription, and had been purchased by residents and citizens of all the States and by aliens in London. Now, let us assume (as plaintiffs in error contend) that a citizen of Tennessee purchasing and holding one of the bonds is entitled in respect of it to the lien of the mortgage without subjection to previously created claims, while a citizen of Kentucky, as a holder of like bond, is not. The bonds are made payable to bearer. They pass in open market into many hands; they bear no indorsements to indicate the first holder—who is entitled or not (as his residence may have been) to the enforcement of the lien of the mortgage without subjection. The legislature will be taken to have known the probable methods and results of such a bond issue, and the inconveniences and absurdities attending an attempt to protect a resident of the State claiming, as a bondholder under such mortgage, priority over other bondholders and antecedent creditors.

Again, all mortgages secure bonds *equally and without preference*. It is not to be presumed that the statute

intended to disturb the ordinarily understood rights, and customs obtaining in the financial world, further than its terms necessarily compel.

(3) Kindred Acts of the same State may be looked to, as an aid to construction.

In 1873 the Legislature of Tennessee subordinated railway mortgages to certain claims against the mortgagor company, on causes of action antedating and postdating the lien of such mortgages, but Tennessee mortgagees were not excepted: Act 1873, Ch. 8.

In 1877, the same Legislature that passed the Act now in question, enacted another statute which provided that no railway company should create a mortgage on its property in Tennessee that should be valid as against judgments for materials furnished and damages done in the operation of the road, but all mortgagees were alike affected: Act 1877, Ch. 12.

(4) Both this Court and the Tennessee Court adopt the rule that one of two possible constructions of a statute will be adopted which will uphold it as constitutional. The presumption in favor of constitutionality obtains even *against* the more natural interpretation of the language used: Presser v. Illinois, 116 U. S., 252; Hooper v. California, 155 U. S. 657; Cole v. Mfg. Co., 90 Tenn., 466; Dugger v. Ins. Co., 95 Tenn., 245.

The construction contended for by defendants in error is the more obvious one, and in addition saves the Act from unconstitutionality.

(b) But counsel of plaintiffs in error argue that to place a construction on Act 1877, Ch. 31, Sec. 5, that would subject the mortgage lien of a resident or citizen of Tennessee, would be to make the statute work an absurd result. They say: "The proposition is, that a Tennessee creditor who has no judgment and no mortgage, shares with all other Tennessee creditors until the former takes judgment or mortgage, and by that act he loses his right to share with Tennessee creditors, and instead of getting a benefit by

his diligence,in case of subsequent insolvency, he not only loses the lien of his judgment or mortgage as to all debts contracted to Tennessee creditors before the registration or rendition, *but in addition loses the right that he formerly had as a general (unsecured) creditor.*"

Counsel have overlooked or misconceived the record and rulings of the State Courts to the effect that the statute only means to subordinate the lien of the mortgage or judgment—not to disturb the rights of the creditor who takes the mortgage or judgment as they stood antecedent to the attaching of the lien thereof. Such rights of such creditors are *not lost to them.* The statute was construed by the State Courts to grant the "prior lien" of the mortgage or judgment "against all debts which may be incurred subsequent thereto," but to deny such *priority of lien* only (and not the *debt* in its original *status*) to either mortgages or judgments, as respects antecedent debts.

And this was the application actually made by the Courts to the rights of parties. Thus: H. C. Jarvis, a resident of Tennessee, recovered a judgment against the insolvent Carnegie Land Company, and notwithstanding he thus became a "judgment creditor," he did not, on that account, lose his rights as they stood at the date his "debt was made." That claimant was given no *priority by reason of his judgment;* and he was forced back to his *status* and rights as they stood before his judgment was taken, the Court saying: "The real difficulty in connection with this claim is over the contention whether the claim should be treated as a debt as of the date of his decree, *or as of the date of his right to recover.* Manifestly, his right of action existed long before the Land Company placed any mortgage upon its properties:" Rec. 80, 81.

Frame King, a non-resident of Tennessee, standing in the right of Jas. H. Preas, a resident of Tennessee, notwithstanding the claim was reduced to judgment, was permitted to share in the assets. He did not lose his *status* of general unsecured creditor in becoming a judgment creditor; but

he was not granted any priority on account of his judgment. The Court adjudged: "The Court of Chancery Appeals was in error in depriving Jas. H. Preas of the right to share in the assets to the extent of his payments, with interest, on his suretyship for the Carnegie Land Company to Frame King, such payments *to be prorated upon as of date of suretyship, Dec.* 23, 1891,"—not as of date of the judgment: Decree Supreme Court, Rec. 88; date of judgment June 8, 1893, Rec. 82.

Wilberforce Sully, as assignee of W. E. Maiden and wife, Sully a non-resident standing in the right of his assignors, was placed in the class of Tennessee creditors entitled to priority, notwithstanding judgment had been taken on the claim; but the intervenors were remitted to the *status* the claim had on date of its creation, and were granted no priority because of the judgment.

Nowhere in the record does it appear that a Tennessee resident was granted any privilege or immunity because of a judgment taken or mortgage held by him. On the contrary, they have been forced in every instance to proof and position of original *status* of the particular claim.

The contention of, and construction of the statute by, plaintiffs in error, if correct, would grant to a resident of Tennessee who has reduced to judgment a demand of a corporation of Virginia, contracted with it but transferred to such Tennessean (thus becoming a "judgment creditor") over residents of Tennessee. However, the contrary of this was held by the State Courts in respect of several claims: e. g., Carnegie Iron Co., a foreign corporation, claim assigned to A. R. Wing, a resident of Tennessee, who took judgment thereon, but was denied right of priority: Rec. 73, 74.

Therefore, the actual construction placed on the Act being contrary to the contention of the plaintiffs in error, this Court will not undertake to reconstrue the Act or adopt another construction of this State statute: Missouri Ry.

v. Nebraska, 164 U. S 414; and cases cited; Phoenix Ins. Co. v. Gardner, 11 Wall. 204.

Under this construction by the State Court, if Carhart has, to the Court's satisfaction, shown himself to be a *citizen* of New York, he is as such entitled to share with residents of Tennessee, as a *general unsecured creditor*, in the priority over his own mortgage, *provided* he can show that his debt from the Carnegie Land Company was created before, and not after, the attaching of the mortgage lien. If he had rights before the registration, as a general creditor, they were not lost to him by the lien of the mortgage. He only loses the right to assert that *lien* (not his debt so contracted) as against antecedent creditors, residents of Tennessee, and non-resident individuals (*Blake v. McClung*) But Carhart shows on the face of his pleading that his claim arose March 1, 1893, by note, to which he took the mortgage bonds as collateral security. He thus fails to bring his debt within the antecedent class: *Ante* A.—I (d). On the same facts a resident of Tennessee would have been postponed in like manner, and, in fact, were so postponed.

(c) Opposing counsel do not undertake to state or argue that the State Court, having resident mortgagees and non resident mortgagees before it in contest, denied privileges and immunities to the latter, while granting them to the former; as was the case in *Blake v McClung*, *supra*. The argument, rather, is that the statute is *subject to a construction* that would cause discrimination between resident and non-resident mortgagees, against the latter; not that the statute was so construed and enforced.

The question thus made is a moot one. It will be time enough to pass upon the discrimination when it occurs—not by way of hypothetical assumption that, had there been Tennessee mortgagees before the State Court they might, under one of two constructions of the statute, be granted the immunity in question. This Court will decide such constitutional questions only as the necessity arises: Baker v. Grice, 169 U. S., 292.

"Because a State statute might be construed so as to cause it to violate the Constitution of the United States, is not sufficient to raise a Federal question; but the right of the plaintiff in error is limited to the enquiry whether, in the case presented, the statute is so applied as to deprive him of his constitutional right:" Castillo v. McConnico, 168 U. S. 680; Phoenix Ins. Co. v. Gardner, 11 Wall. 204.

(d) The Travelers' Insurance Company being a corporation, is not entitled to relief under Art. IV, Sec. 2, *as a mortgagee*, even if A. B. Carhart, as a citizen mortgagee, is entitled to the protection of that clause of the Constitution: Blake v. McClung, 172 U. S. 250.

(e) If Carhart, standing on the lien of his mortgage of Feb. 10, 1893, is declared by this Court entitled, under Art. IV, Sec. 2, U. S. Constitution, to have been denied privileges and immunities granted to citizens of Tennessee; and, in addition, it be held that residents of Tennessee have, as just indicated, a constitutional priority over the mortgage of Travelers' Insurance Company of Nov. 23, 1891, then it must follow that residents of Tennessee have contractual (not statutory) priority over Carhart's mortgage, as to the Hotel Carnegie property, in this:

The statute constitutionally makes the first mortgage subject to residents of Tennessee and non-resident individual citizens: Blake v. McClung, *supra*. When Travelers' Insurance Company took that mortgage it did so with knowledge, and with an *implied contract* imposed upon it by law (Provident Institution v. Jersey City, 113 U. S. 515,) to take subject to the preferred class.

When the mortgage to Wiberforce Sully, Trustee, was executed on Feb. 10, 1893, it was on its face expressly *made subject* to the mortgage securing Travelers' Insurance Company. Sully, Trustee, and Carhart, bondholder, are therefore estopped to say that the first mortgage is in anywise invalid: Bronson v. Railway, 2 Wall. 283; Jerome v. McCarter, 94 U S. 734.

If B. takes subject (by way of statute and implied contract) to A., and C. take subject (by express contract) to B., then A. has priority over C. If C., by reason of a mortgage lien, receive the $25,000.00, the products of the twice-mortgaged property, he cannot hold same as against B.; neither can B. hold as against A. It will be noted that if C. recovers it will be by reason of the *lien of his mortgage*, and this he has voluntarily subjected to B's rights. The decree of the State Court is as to said property maintainable on this ground, even if Carhart's full contention under Art. IV, Sec. 2, in respect of his mortgage, be conceded him. If such constitutional right is here decreed to Carhart, as mortgagee, the Court is asked to indicate how far that would disturb this rule of general jurisprudence, as relating to decrees renderable by the State Supreme Court.

II.—UNDER FOURTEENTH AMENDMENT TO U. S. CONSTITUTION.—Certain of the plaintiffs in error, Wilberforce Sully, Trustee, A. B. Carhart and Travelers' Insurance Company assigns as error that they were denied by the State Court the protection of the Fourteenth Amendment.

(a) *Equal protection of the laws.*—Neither of these plaintiffs in error was a person "within the jurisdiction" of Tennessee, so that they were not denied the protection of that clause of the Amendment which guarantees the equal protection of the laws: Blake v. McClung, *supra*. And such right is not asserted in argument.

(b) *Due process of law.*—But the insistence is, that due process of law has been denied them.

It would seem that this question was settled against plaintiffs in error by this Court in *Blake v. McClung*, *supra*. There it appeared that under this same Act of 1877, Ch. 31, a citizen of Virginia, within the meaning of this clause, was denied the right to participate upon terms of equality with residents of Tennessee in the distribution of assets of a foreign corporation doing business in Tennessee. The contention there made by such citizen of Virginia was that he was

denied due process of law, in that he was denied by the Act the right to proceed to judgment, execution, and satisfaction, or to intervention, on terms of equality with Tennesseans. The contention here is that the plaintiffs in error were deprived of obtaining *mortgage security* for indebtedness without submitting to the same priority. In both cases, in the last analysis, the thing complained of is subjection to a preference in behalf of a class. In the one case, the denial was of the right to take mortgage without this condition; in the other the denial was of the right to obtain for a debt in existence satisfaction or security by the usual processes of law. In neither case can it be said that the respective plaintiffs in error were *deprived* of their property: Blake v. McClung, *supra.*

Plaintiffs in error argue that under the Act their mortgages were permitted to become first liens, and that such first liens were "taken away by the accidental happening of an unforseen contingency, not contracted for—insolvency." It is a mistaken assumption that plaintiffs ever had priority of right over the defendants in error by reason of their mortgages, or that the character of their liens ever changed. It is true that they had *liens* on the property, but those liens were *in and from their inception* subject to the statutory priority. This priority was not so much a lien as a preference, and may be likened to preferences or priorities of United States, States, partnership creditors over individual creditors, claims of the character shown in Frazier v. Railway, *post*, Provident Institution v. Jersey City, *post.*

Furthermore, this subjection of the mortgage liens is not confined necessarily, though it be applicable usually, to administration of corporate assets in insolvency; but this preference may take place in "the subjection of any part of the assets;" very much as intervene the rights of firm creditors in event a levy is made on firm assets by a creditor of one of the members of the firm.

If the question is to be debated anew, then there are numerous cases holding that on the facts here appearing, the mortgagees were not denied due process of law.

(1) *As to power to restrict right to contract.*—Each State has the power by general laws to regulate the conveyance and disposition of all property, real and personal, within its jurisdiction; Brown v. Smart, 145 U. S. 454; U. S. v. Fox, 94 U. S. 315.

The right to contract is not absolute, but may be subjected to the restraints demanded by the safety and welfare of the State without violating this amendment: St. Louis Railway v. Paul, 173 U. S. 404; Orient Ins. Co. v. Daggs, 172 U. S. 562.

The right of a State to deny to corporations the right to mortgage their property or to regulate the exercise, is undoubted: 3 Cook., Corp. Sec. 859; Jones, Mort. Sec. 124.

And equally clear is the right by statute to prescribe that a mortgage, if so executed, shall carry rights which shall be subordinate to those of a preferred class. Thus a provision subordinating a corporate mortgage to after-arising claims for labor and material, etc., are valid: Brooks v. Ry. 101 U. S. 443; Gilchrist v. Helena Ry. 58 Fed. Rep. 708; 2 Jones, Liens, Sec. 1628; Central Trust Co. v. Sloan, 23 Am. & Eng. R. Cas., 398.

And the priority need not be to laborers or material men who preserve or add to the value of the mortgage premises, as adverse counsel contend. Thus, injuries to persons or property of others may constitutionally be made superior even to a *previous* mortgage: Central Trust Co. v. Sloan, *ante;* Frazier v. Ry. Co., 88 Tenn., 160, affirmed by this Court, 139 U. S. 288, involving Act 1877, Ch. 12, mentioned above, and involving a claim that in nowise affected the preservation or increase of the mortgage property.

This Court has also held that the Legislature may validly enact that the lien of a mortgage upon realty, executed after the Act, shall be subordinate to a charge for water rents made by the Act a preferred claim upon the realty; and such Act is not in contravention of the Fourteenth Amendment, even though the State Court construe such water rents not to be valid as taxes or as special assessments, but

upholds same as against the mortgage lien on the ground that the mortgagee had taken its mortgage impliedly assenting or contracting with reference to the law governing water rents. The Court said: "The mortgagee chose to take its mortgage subject to this law; and it is idle to contend that a postponement of its lien to that of water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act, its own consent, is an element in the transaction:" Provident Institution v. Jersey City, 113 U. S. 515.

Bondholders under such a mortgage take their securities with notice of, and subject to, the Act, also with notice of the *status* of a company coming in thereunder: McCormick v. Bank, 165 U. S. 538; Edwards v. Kearzey, 96 U. S. 595, 601; 3 Cook, Corp. Sec. 859; Va. Development Co. v. Crozier, 90 Va. 126; S. C. 44 Am. St. Rep. 893.

The case at bar is only made stronger by the fact that the mortgagor was a foreign corporation, relieved by this Act from the penalties of alienage as to its estate, on condition that its property should stand in the first instance as security for a preferred class.

(2) *As to arbitrary class legislation.*—The further contention is made that the Act is obnoxious to the objection that it creates an arbitrary class.

(a) The arbitrary class, according to the argument, is not the *preferred* class—residents of Tennessee. Indeed, when that class was not enlarged by the entry into it of non-resident individual citizens, the Act was not held to be in contravention of Fourteenth Amendment: Blake v. McClung, *supra*. Thus enlarged to include statal citizens, it cannot contravene that Amendment.

(b) The arbitrary class created is said to arise in the segregation of foreign corporations engaged in mining and manufacturing from all other foreign corporations, and the regulation of their estates, by this rule of priority, while other foreign corporations escape.

1. Classification is not forbidden by this Amendment; the Legislature may distinguish, select and classify, and necessarily the power must have a wide range of discretion, and the classification is not reviewable unless palpably arbitrary: Orient Ins. Co. v. Daggs, *supra*, and cases cited. This Court has said that whether the classification is the best that could have been made is not for it to decide. Its province is only to determine whether it could be done at all, and under any circumstances. The Legislature is presumed to have known the conditions prevailing in its State: Dow v. Beidleman, 125 U. S. 680. The Amendment does not prohibit legislation limited to objects to which it is directed, by territory, as cities from country districts: Hayes v. Missouri, 120 U. S. 68; regulation of warehouses in one city: Munn v. Illinois, 94 U. S. 113; regulation of passenger elevators confined to large cities: Budd v. N. Y., 143 U. S. 517.

And may validly classify thus: Express companies may be included, while railway companies carrying express are excluded: Ex. Co. v. Seibert, 142 U. S., 339; sales made on 'change included and other sales excluded: Nicolls v. Ames, 173 U. S. 521; foreign from domestic corporations: Fire Asso. v. N. Y., 119 U. S. 115; Pembina Co. v. Pa., 125 U. S. 653; A's business from B's where they are of distinct character: Magoun v. Bank, 170 U. S. 283; as between different users of steam power, in respect of fires: Ry. v. Mathews, 165 U. S. 25; as between plaintiff and defendant in respect of attorney's fees: Atcheson Co. v. Mathews, 174 U. S. 913; holdings of land above from those under a certain acreage: King v. Mullins, 171 U. S. 435; one turnpike from others: Covington Co. v. Sanford, 164 U. S. 590; railways of less than fifty miles length from those above: Ry. v. N. Y., 165 U. S. 630.

2. The argument was directed in the case of *Blake v. McClung* to the point of arbitrary class legislation. Counsel for plaintiffs there, said in written argument: "It is true, as a general proposition, that it is not within the Fourteenth Amendment to with-

hold from the States the power of classification, and if that the laws enacted by State legislatures deal alike with all of a certain class they are not obnoxious to the charge of denial of equal protection, and yet it is equally true that such classification cannot be made arbitrarily:" Record in Blake v. McClung, 16141, Argument, p. 28. But the Act was held not to contravene the Fourteenth Amendment: 172 U. S. 260.

At the same term of this Court the exact question was also decided in the case of Orient Ins. Co. v. Daggs, 172 U. S., 562, wherein it was determined that the classification is not arbitrary where foreign fire insurance companies had certain burdens imposed upon them, not applied to other insurance companies.

3. Many reasons may be given why the classification of foreign corporations engaged in mining and manufacturing may be made to exclude foreign insurance companies, foreign railroad companies, etc. Insurance companies have practically no assets in the State; therefore, the Legislature may deem it proper to force them for the security of its residents to import assets, so to speak, in the form of deposit of securities as a condition precedent to the right of transacting business. A foreign railroad company has the most tangible and enduring asset in its road-bed, bridges, depots, etc., and no condition whatever may be thought necessary as to it. The Legislature may well deem assets of mining and manufacturing companies to be less enduring; their products peculiarly subject to be shipped out of the State; their existence as going concerns more speculative, and manipulation more likely in their affairs.

The facts of this case furnish the very strongest vindication of the justness of the legislative policy exhibited in the Act. The office of the Treasurer of Carnegie Land Company was in New York, and its accounts and funds and securities were subject to be kept there. Residents of the State may be deemed not to have had a fair chance of gaining knowledge of the financial condition of a corporation to

which they were lending credit, and which, by their credit, they were building up. The stockholders' meetings were, of necessity, held out of the State; and if a mortgage bond issue were purposed, it may well have been thought, residents of Tennessee were not on equal terms with those of Virginia, where it was competent for the Legislature of that State to have forced publicity of such purpose by advertisement in advance of meeting. In event of insolvency of the Carnegie Land Company, it was competent for the Courts of Virginia to draw into administration there all the assets of this Land Company not found in Tennessee, and in so doing to give priority to creditors holding sealed evidences of indebtedness over those who did not, whereas, seals are abolished in Tennessee, and its residents would thus by indirection be left unprotected. If the stock of the Company were "watered," the jurisdiction, it has been repeatedly held, is solely with the forum of the corporation's domicile to *found administration* for the purpose of calling the stock for the satisfaction of creditors; and calls are made or not, as the laws of Virginia, and not Tennessee, may decide.

In the case at bar, upon the authority of a stockholders' meeting of the Land Company, held in Virginia, a blanket mortgage securing $300,000.00 of bonds was placed upon the property of the Company; the bonds went into the hands of the Treasurer in New York; $85,000.00 of the bonds were by him pledged as collateral security for a note of $14,000.00 to A. B. Carhart, and for a note of $10,000.00 to Mrs. Myton—both being kinspeople of the Treasurer. The bonds were sold by the pledgees and bid in by themselves at the aggregate price of $13,000.00—the bonds, therefore, cost their present holders about fourteen cents on the dollar. It is claimed that they avail to bring to their holder the entire proceeds of the property of the insolvent Company. It appears that even the Secretary of the Carnegie Land Company, a resident of Johnson City, Tenn., was ignorant of all happenings after the bonds were executed, so that when he made up the schedule of the assets for general assignment purposes, he reported $300,000.00 of

bonds, the entire issue, *in the Treasury of the Company at New York.*

If Tennessee officials of the Company were ignorant to this extent, what must have been the plight of an ordinary Tennessee creditor? It is just and equitable for the Legislature to provide against the various forms of corporate manipulation, and for the protection of those who, in the inception of an enterprise, grant it credit, and sell it property that makes possible a mortgage. In the case at bar, if the mortgage plaintiffs in error prevail in this Court, they will receive the proceeds of sale of lands that were purchased of one of defendants in error and not paid for; carpets purchased of another defendant that were not paid for; furniture purchased of another defendant but not paid for; crockery purchased of another defendant but not paid for, etc. It surely is competent for a legislature to prescribe that any mortgage on such property shall be subject to antecedent rights.

4. It is argued in behalf of plaintiffs in error that although the Act may impose notice upon the mortgagee that he must take subject to antecedent debts, yet that the mortgage must really take in ignorance of the number and amount of such debts. We reply that he has a resort to the books of account of the corporation and to all sources of information the mercantile world affords as to *past* transactions. Defendants in error may, with greater force, argue that, without this statutory provisiou, they would be still more lacking in notice, and without ability to learn, of the execution of a mortgage, which at the time of their debts' creation may be in contemplation, but as to which no record may exist, the execution of the mortgage being in *futurity*.

(3) *Act* 1891, *Chap.* 122, *enlarged the class.*— Prior to the execution of either of the mortgages, to-wit: on March 26, 1891, the Legislature of Tennessee passed an act amending Act 1877, Ch. 31, so as to make it apply to *all* foreign corporations. Only mining and manufacturing corpo-

rations had been subject to these terms prior to that date; land companies were first affected, it would seem, unless perhaps their charters gave them manufacturing and mining powers, by Act 1891. The charter of the Carnegie Land Company is not shown so that its powers may be seen; but it incidentally appears that it had not manufacturing powers. When it was thought that the erection of an iron furnace would add to the value of its "boom" town-site, the Land Company did not assume to erect it under its own charter, but instead promoted the creation of a manufacturing company, the Carnegie Iron Company, for that purpose: Rec. 74.

At any rate the mortgagees cannot complain that class legislation as respects the Carnegie Land Company existed at the date their mortgages were executed.

(c) *Questions peculiar to Travelers' Insurance Company.*—(1) It appears that Travelers' Insurance Company did not, in the State Court, assign an error raising specifically any right in it under the Fourteenth Amendment. It did undertake to raise questions as to its rights under the Federal Constitution, but limited such rights to those guaranteed by Art. IV, Sec. 2: Rec. 92.

It is furthermore true that the State Court did not consider or discuss the rights of Travelers' Insurance Company to due process of law. All that appears, by fairest inference, is that it claimed privileges and immunities of statal and national citizenship, respecting both of which it is not a "citizen."

May, then, the Travelers' Insurance Company show jurisdiction in this Court to review the decree of the State Court as respects *its* right to *due process of law*, by showing that the State Courts passed upon the rights of A. B. Carhart to due process of law?

(aa) It is argued that the question of denial of due process of law was necessarily passed upon by the State Courts. It is replied that the right to raise this particular question was optional with the Insurance Company,

and waivable by it. It was clearly waived when that company assigned error under another clause of the Constitution; stood by and saw another party raise *this* question and exercised its judgment and option not to rely upon it, or to amend its assignment of errors so as to do so. May not a party make his own record and exclude from the State Courts' consideration any such question?

(bb) It is also argued that because Carhart raised this Federal question, the benefit of his doing so inures to the Insurance Company. The argument made, *ante* A–I (e) , is repeated in refutation. The Insurance Company hotly contested the mortgage claim of Carhart. Carhart raised this question under a writ of error, which carried up his rights alone. This Court, in a like condition of record, declined in *Blake v. McClung* to review the rights of parties who did not join in the writ of error: 172 U. S., 261. The State Court did the same thing.

The doctrine of substitutional raising of a Federal question, it is conceived, will not approve itself to this Court. *Quere:* Assume that Carhart, and not the Insurance Company, had been granted relief under his writ of error to the State Court on the ground of denial of due process, and that the Insurance Company had alone prosecuted the present writ. Would its doctrine of the substitutional raising of the question avail here? What if the Insurance Co., only, had raised the question of immunities of Statal citizens, and that Carhart, alone, had prosecuted this writ of error?

(2) It further appears that the trustee in the trust deed, securing Travelers' Insurance Company, in which trustee was lodged the legal title to the property, was made a party to the cause by the Travelers' Insurance Company: Rec. 35; and appeared with the Insurance Company defending against the mortgage of Carhart: Rec. 32.

The trustee has not joined in the writ of error, nor has severance been had as to it. Under all the authorities, it is

a necessary party to the record: O'Hara v. McConnell, 93 U. S., 154. Travelers' Insurance Company stands here alone asserting a right touching deprivation of property—that relates to the title if to anything—a right that belongs to the trustee. Not having joined it in the writ, or severed as to it, no relief is grantable: Garland's Fed. Prac., Sec. 332, 333; May. S. C. Prac., 552; it would seem to any party.

(d) If Carhart, but not Travelers' Insurance Company, is entitled to relief because of denial of due process of law, the insistence made above (B) (1) (c) is here repeated.

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